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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 919

NATHAN FOGLE, BETTY RUTH FOGLE and KAMP-ETTE, INC., an Indiana Corporation,

Petitioners,

v.

JACOB FOGLE, ESTHER W. FOGLE, JOHN NIBLACK, JOSEPH G. BABCOCK, DWAIN COCHRAN, FRANK COX, BLOOR REDDING, W. CLIFFORD McNICHOLL, HENRY E. COCKERILL, ANN R. COCKERILL, JONES VENDING SERVICES, INC., an Indiana Corporation, NEWMAN CANDY COMPANY and TRAVELERS INSURANCE COMPANY, a Connecticut Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, citizens of the State of Indiana and of the United States and an Indiana Corporation, respectfully pray that a Writ of Certiorari issue to review the final order of the United States Court of Appeals for the Seventh Circuit rendered September 29, 1967 which denied the motion of petitioners to reopen their appeal.

Opinions Below

The opinion of the United States District Court for the Southern District of Indiana, Indianapolis Division (No. IP 63-C-70) is unreported and is annexed hereto. The

United States Court of Appeals for the Seventh Circuit has rendered no opinions and its decision of March 26, 1964 dismissing the appeal and its decision of September 29, 1967 denying the motion to reopen the appeal are unreported and are annexed hereto.

Jurisdiction

The final order of the Court of Appeals was entered September 29, 1967. Jurisdiction is conferred upon this Court 28 U. S. C. Section 1254(1) and 42 U. S. C. Section 1983.

Questions Presented for Review

1. Does a Municipal Judge have immunity from suit for fraudulent acts done under color of his office as a Judge of the Marion County Circuit Court, State of Indiana?

2. Do such court officials as commissioners, receivers, appraisers and their sureties who assist such judge in the execution of his fraudulent enterprise enjoy any immunity from suit because they are officers of said court?

3. Are the petitioners barred from relief in the Federal courts?

4. Are the causes of action alleged in the complaint in the United States District Court barred by prior decisions in the controversy in the State courts?

5. Do the actions of city police officers in arresting and imprisoning petitioner, Nathan Fogle, in aid of the general conspiracy deprive said petitioner of his liberty and property under such color of authority as to justify federal intervention?

Statutes Involved

Section 1983 of Title 42 of U. S. C. reads:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 1254 of Title 28 of U. S. C. provides for review by this Court of cases in the United States Courts of Appeal.

Reasons Relied on for Granting the Writ

By largely ex parte actions of a County Judge the plaintiff-petitioner's real property was seized and sold causing petitioner, Nathan Fogle, to lose more than $200,000. Because of the close ties of the judge and his cooperating court officials to the Bar in Indiana, petitioners were unable to obtain relief in the state or United States District Court and their attorney failed to prosecute an appeal in the Court of Appeals for the Seventh Circuit, although instructed so to do. It took the petitioners almost three years to secure counsel in New York City to undertake the task of bringing the matter before the Court of Appeals for the Seventh Circuit which denied any consideration to the appeal on the ground of too long a delay.

Where the petitioners are the victims of a comprehensive withholding of legal services in the area in which they live this court should exercise discretion to see that justice is not denied.

ARGUMENT

Abuse of office to secure private gain is not protected by judicial immunity.

Although, generally, a state judge may not be sued under 42 U. S. C. 1983, where, as here alleged, said judge had a direct financial gain from the transactions impugned, along with his confederate court officials, his immunity is removed. *Sarelas* v. *Sheehan,* 326 F. 2d 490; *Johnston* v. *Stone,* 268 F. 2d 803. The protection afforded a state judge so that he may decide matters before him without fear or favor cannot be twisted to afford him a shield behind which he may fraudulently deprive litigants of their property for his own personal gain. *A fortiori,* does this principle hold for the lesser court officials who assist in carrying out the nefarious scheme.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CONRAD J. LYNN,
Attorney for Petitioners,
401 Broadway,
New York City 10013.

APPENDIX

Opinion.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

No. IP 63-C-70

NATHAN FOGLE, BETTY RUTH FOGLE, KAMP-ETTE, INC.,

Plaintiffs,

v.

JACOB FOGLE, ESTHER W. FOGLE, JOHN NIBLACK, JOSEPH G. BABCOCK, DWAIN COCHRAN, FRANK COX, BLOOR REDDING, W. CLIFFORD MCNICHOLL, HENRY E. COCKERILL, ANN R. COCKERILL, JONES VENDING SERVICES, INC., NEWMAN CANDY COMPANY, and TRAVELERS INSURANCE COMPANY,

Defendants.

ENTRY FOR SEPTEMBER 23RD, 1963

Come now the parties, plaintiff and defendant, by counsel, said cause having been assigned for hearing and oral argument on pending motions for Friday, September 13, 1963 at 2:00 p.m.

And argument is submitted and heard, and the court having examined the memorandum, briefs, and affidavits and records submitted in support of the various motions pending, and being duly and fully advised in the premises,

hereby and now sustains each of the motions to dismiss heretofore filed, or hereinafter filed, by each of the joint and several defendants, and judgment against the plaintiffs and for each of the defendants jointly and severally is hereby and now entered with prejudice that the plaintiffs shall take nothing by their complaint, and the defendants shall have and recover their respective costs paid out and expended.

ALL OF WHICH IS HEREBY AND NOW DULY ORDERED, ADJUDGED, AND DECREED by the court on this 23rd day of September, 1963.

WILLIAM E. STECKLER,
Judge.

Date, September 23rd, 1963.

Decision, dated March 26, 1964.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois, 60610

Thursday, March 26, 1964

Before Hon. JOHN S. HASTINGS, Chief Judge,
Hon. WIN G. KNOCH, Circuit Judge,
Hon. LUTHER M. SWYGERT, Circuit Judge.

No. 14473

NATHAN FOGLE, et al.,

Plaintiffs-Appellants,

vs.

JACOB FOGLE, et al.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION.

This matter comes before the Court on the separate motions of defendants-appellees John Niblack, Jacob Fogle, et al., and Travelers Insurance Company, to dismiss this appeal for failure to comply with Rule 16 of the Rules of this Court, with briefs in support, and plaintiffs-appellants' answer to said motions and motion to extend time for filing plaintiffs-appellants' brief and appendix.

On consideration whereof, IT IS ORDERED and adjudged by this Court that this appeal be, and the same is hereby DISMISSED with costs for failure to comply with Rule 16 of the Rules of this Court.

Decision, dated September 29, 1967.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois, 60604

September 29, 1967

Before Hon. JOHN S. HASTINGS, Chief Judge,
Hon. WIN G. KNOCH, Circuit Judge,
Hon. LUTHER M. SWYGERT, Circuit Judge.

No. 14473

NATHAN FOGLE, et al.,

Plaintiffs-Appellants,

vs.

JACOB FOGLE, et al.,

Defendants-Appellees.

Upon consideration of the plaintiffs-appellants' motion to reopen appeal and the accompanying affidavit attached thereto,

IT IS ORDERED that the motion be and the same is hereby denied, the motion and affidavit containing no adequate reason for granting the motion, particularly in view of the long time interval between the dismissal of this appeal on March 26, 1964 for failure to comply with Rule 16 of this court and the filing of the motion to reopen on September 10, 1967.

Affidavit of Nathan Fogle, Attached to the Foregoing Decision.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 14473

NATHAN FOGLE, BETTY RUTH FOGLE and KAMP-ETTE, INC., an Indiana Corporation,

Plaintiffs-Appellants,

v.

JACOB FOGLE, ESTHEL W. FOGLE, JOHN NIBLACK, JOSEPH G. BABCOCK, DWAIN COCHRAN, FRANK COX, BLOOR REDDING, W. CLIFFORD MCNICHOLL, HENRY E. COCKERILL, ANN R. COCKERILL, JONES VENDING SERVICES, INC., an Indiana Corporation, NEWMAN CANDY COMPANY and TRAVELERS INSURANCE COMPANY, a Connecticut Corporation,

Defendants-Appellees.

STATE OF INDIANA
COUNTY OF MARION } ss.:

NATHAN FOGLE, being duly sworn, deposes and says that he is a plaintiff in the above entitled appeal from the United States District Court, Indianapolis Division, Southern District of Indiana.

This affidavit is made necessary because of the dismissal of the appeal herein in this Court on March 26, 1964 for failure of your deponent's attorney to comply with Rule 16

of the Rules of this Court. Your deponent's attorney, Gerald E. Stinson, Esq., of 900 Circle Tower, Indianapolis, Indiana, had failed to file his brief and appendices in this Court. When your deponent questioned him about this his only answer was that a great deal of pressure had been brought upon him to cease representing your deponent in the case, but your deponent was not apprised of this until he discovered long after March 26, 1964 that the appeal had been dismissed. Even at this late date your deponent has not received any other explanations for the failure of his legal representative to file said papers and Gerald E. Stinson, Esq., has failed to answer the inquiry about the status of the appeal from his present attorney, Conrad J. Lynn, Esq., of 401 Broadway in New York City, made by letter on July 11, 1967.

The nature of the original case against the above appellees may explain why your deponent has had such difficulty obtaining proper representation to pursue the merits of his action. The original defendants include John Niblack of the Marion County Circuit Court of Indiana, W. Clifford McNicholl, a receiver and Commissioner in said County, Frank H. Cox and Bloor Redding, Official Appraisers in said County, as well as the brother and sister-in-law of your deponent. The gist of the action in the District Court was the charge that Judge Niblack appointed receivers in a civil action in the Marion County Circuit Court of Indiana without notice to deponent, who was and is owner of the real estate. That your deponent obtained a temporary writ of prohibition against Judge Niblack from the Supreme Court of Indiana but that said Judge ignored said writ and ordered the real property of your deponent sold for $39,000.

The said real estate actually was worth in December, 1961, the date of the ordered sale, at least $240,000.00.

Affidavit of Nathan Fogle, Attached to the Foregoing Decision.

The co-conspirators with Judge Niblack bought said property from the receiver in the conspiracy for $40,000.00 and have been acting ever since as owners of said real estate against the opposition of your deponent. The receiver and commissioner who approved the price and the sale along with Judge Niblack, W. Clifford McNicholl, was the attorney for Jacob Fogle in the transaction who received the property for $40,000.00.

The defendant Travelers Insurance Company was surety on the bonds of defendant W. Clifford McNicholl and were chargeable with notice of the writ of prohibition. The defendant Joseph G. Babcock was a police officer of the City of Indianapolis when he arrested your deponent on May 22, 1962 at the behest of Jacob Fogle on a trumped up charge which was dismissed. Said arrest was in furtherance of the conspiracy.

Your deponent has made every effort in the State of Indiana and in the State of Illinois to find a competent attorney who will handle this appeal before this honorable Court, but he has been unable to find any attorney until he retained his present attorney in New York City. Your deponent respectfully submits that the long period of time that has elapsed since this appeal was dismissed for failure to prosecute in 1965 was not due to lack of diligence on his part but your deponent has been under great harassment and periodic imprisonment at the behest of the appellees in this matter who have been trying to compel him to consent to the illegal sale of his $240,000 property. Your deponent does not believe this Court will countenance the denial of any forum to him by the combination of State and City officials represented by the appellees herein.

WHEREFORE, your deponent respectfully prays that this Court permit his present attorney to prosecute his appeal

and therefore your deponent respectfully asks that the dismissal order of March 26, 1964 be set aside and the deponent be permitted to prosecute his appeal on the merits.

NATHAN FOGLE.

Sworn to before me this
29th day of July, 1967.

CONRAD J. LYNN,
Notary Public,
State of New York.
No. 44-2437850.
Qualified in Rockland County.
Certs. filed with N. Y. Co. Clerk & Register.
Term expires March 30, 1969.